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The Relation Existing Between Irrigation Water Users and Distributing Companies With Special Reference to Rights Arising Out of Contract

(CONTINUED FROM JULY ISSUE)

IV.

THE question as to whether a water right is a property interest in the plant is not only a very difficult one, but at the same time a very important one for the reason that fees for "water rights" have been so universally charged by distributing companies. These fees have been paid in exchange usually for a perpetual right to receive water, not for water actually received. Since the constitution compels service by making the distribution of water a public service, the question is presented: what is a water right? What can it give to the consumer that the law has not already given him? The only answer seems to be that it gives him an actual property right, a real interest in the pipes, ditches and distributing plant. At least this is the theory that the courts have adopted and it is reflected in practice—if it did not originate there—in the custom of converting stock companies into mutual companies by exchange of water rights for shares. Many contracts include a clause providing for such a transfer, on the theory that when water rights have been sold to all the area for which the water was appropriated, the distributor steps out and the consumers find themselves the joint owners of the system.

Many practical arguments have been advanced in favor of this system. Perhaps the strongest of these is that mentioned above, namely, that it is being successfully operated to the satisfaction of all parties concerned, with little speculation as to its legal aspects. Another strong argument for the general plan

is to be found in the irrigation district projects in which the national or state governments have acted as benevolent distributors, furnishing part or all of the capital necessary to get the area under irrigation, but with the ultimate intention of removing their capital and leaving the irrigators the owners of their own water system.

Mr. Wiel suggests a financial argument⁸⁷ to the effect that charges for water rights are necessary in order to induce companies to go into a business which, under the thumb of public control, and lacking in a profit on the building of the system, would be too precarious to interest capital. There seems some question as to the validity of this reasoning, for it ignores the facts that the company having its capital invested in the property of the system, continues to own the same, and the profit on the building of the system is yielded when the system is sold, as it may be at any time.

Moreover there is an argument of public policy against allowing the company to plan on stepping out of the business by selling out all the water rights in its system. The sale of each water right means the removal of that much of its capital and it means the reduction, to just that extent, of the incentive to serve diligently. The law provides for forfeiture of the franchise⁸⁸ because of certain violations of the company's public duties. The fear of such a forfeiture will decrease proportionately with the decrease in the amount of the capital jeopardized, and in the same ratio will decrease the probability of good service.

From the legal point of view the validity of easements becomes questionable only when the laws of public service are applied to the distribution of water. There is no inherent reason why a water right should not be an appurtenance or easement to certain land. On the contrary, the most natural situation would be for the water right to attach to land, as in the common law theory of riparian rights, which attaches the highest importance to the geographical position of land, with the advantage in favor of upper owners. Public service recognizes no such principle; its fundamental tenets are equality of right by reason of status alone. The two theories conflict and public service must

⁸⁷ *Supra*, n. 19, Vol. II, p. 1232.

⁸⁸ Act of 1885, *supra*, n. 9.

control because the constitution has so provided.⁸⁹ The question then arises: Do such "easements" or "water rights" create discrimination so as to be invalid?

Colorado has definitely adopted the view that they are not invalid—a result which would be expected from her theory of the identification of the consumer with the original appropriator on the stream. But she has recognized the public service requirement and insured its effectiveness by forbidding water companies to make a charge for such a "water right."⁹⁰ Idaho has practically followed the example of Colorado in this matter,⁹¹ and the general tendency among the Western States may be said to be in the direction of recognizing these easements, though not to the extent of making valid contract charges for water rights as conditions precedent to service.⁹² Perhaps the true situation in the Western States, stated in general terms, is something as follows: Through the increase in development of water by mutual companies and irrigation district projects the validity as well as the importance of water rights is becoming more and more firmly established as a legal conception growing out of the successful practical administration of water rights; but when the doctrine has come into conflict with the rigidity of public service principles, it has yielded for the simple reason that the public service principles rested in most instances upon a firmer foundation, namely, the constitution.

Turning now to the law of California, cases and statutes are found to be in the same confusion that characterizes other branches of our water law. The Federal courts have taken an active part in making the law on this subject. Their earlier decisions were based upon strict adherence to the public utility

⁸⁹ *Supra*, n. 5.

⁹⁰ *Colo. Laws*, 1887, p. 308.

⁹¹ *Idaho Laws*, 1899, p. 380, § 20; *Nampa & Meridian Irrigation District v. Gess* (1910) 17 *Idaho* 552, 106 *Pac.* 993; *Idaho Rev. Codes*, § 3292; *Childs v. Neitzel*, *supra*, n. 43; *State v. Twin Falls Canal Co.* (1912) 21 *Idaho* 410, 121 *Pac.* 1039.

⁹² *Colorado*: *Wheeler v. No. Colo. Irrigation Co.* (1888) 10 *Colo.* 582, 17 *Pac.* 487; *Dickson v. Dick* (1915) 59 *Colo.* 583, 151 *Pac.* 441. *Idaho*: *Wilterding v. Green* (1896) 4 *Idaho* 773, 45 *Pac.* 134; *Boise City Irrigation Land Co. v. Clark*, *supra*, n. 65; *Green v. Byers* (1909) 16 *Idaho* 178, 101 *Pac.* 79; *Hanes v. Idaho Irrigation Co.* (1912) 21 *Idaho* 512, 122 *Pac.* 859. *Arizona*: *Gould v. Maricopa Canal Co.*, *supra*, n. 63; *Salt River Valley Canal Co. v. Nelssen* (1906) 10 *Ariz.* 9, 85 *Pac.* 117. *Texas*: *Hartford Fire Insurance Co. v. City of Houston* (1908) *Tex. Civ. App.* 110 S. W. 973; *Texas, Rev. Stats.* 1895, Art. 3125. *Nebraska*: *Fenton v. Tri-State Land Co.*, *supra*, n. 45.

theory by which charges for water rights as conditions of service were not recognized, and the possibility of attaching to the land a greater easement of water service than the constitution already gave it was in effect denied; this, for example, was the view in the case of *San Diego Land & Town Company v. City of National City*⁹³ (1896). This case was affirmed by the Supreme Court,⁹⁴ although the water right question did not seem to be much in issue. In the same year *Lanning v. Osborne*⁹⁵ contained a *dictum* to the same effect. Two years later the rule was announced in *Mandell v. San Diego Land and Town Company*.⁹⁶ In the case of *Souther v. San Diego Flume Company* (not reported) the right of a water company to exact any sum of money or other thing, in addition to the legally established rates, as a condition upon which it should furnish water to consumers, was denied by the Circuit Court, but on appeal the authority of the *Park* case was recognized as controlling. This decision of the Circuit Court of Appeals was reaffirmed after a rehearing in 1900.⁹⁷ There was another decision in 1903, but the point was not discussed or involved.⁹⁸ In *San Diego Land and Town Company v. Jasper*,⁹⁹ decided by the Circuit Court in 1901, the court felt bound by the holdings in the *Park* case and the *Souther* case and recognized the validity of the water right charge. But it is to be noticed that the court, while following the *Park* and *Souther* cases, did so reluctantly. Judge Ross criticises the *Park* case, saying that it did not stand for the broad proposition that a water right charge is legal, for the reason that it was not shown that the water was appropriated under the constitution of 1879, and the inference was that the appropriation antedated that constitution.

On the other hand the State Supreme Court consistently recognized water rights up to 1909. *Price v. Riverside Land and Irrigation Company*¹⁰⁰ (1880) contains language indicating that

⁹³ *Supra*, n. 23.

⁹⁴ *San Diego Land and Town Co. v. National City* (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

⁹⁵ *Supra*, n. 23, affirmed (1900) 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860.

⁹⁶ *Supra*, n. 23.

⁹⁷ *San Diego Flume Co. v. Souther* (1898) 90 Fed. 164, 32 C. C. A. 548; (1900) 104 Fed. 706, 44 C. C. A. 143; (1901) 112 Fed. 228.

⁹⁸ *Souther v. San Diego Flume Co.* (1903) 121 Fed. 34, 57 C. C. A. 561.

⁹⁹ (1901) 110 Fed. 702.

¹⁰⁰ *Supra*, n. 16.

the court interpreted section 552 of the Civil Code¹⁰¹ literally. *Fudickar v. East Riverside Irrigation District* (1895)¹⁰² recognizes the right of a contract to grant "a continuous flow of water on certain land." In spite of Judge Ross' criticism,¹⁰³ the case of *Fresno Canal Company v. Park*¹⁰⁴ seems distinctly to assert and sustain the right of an appropriator of water for sale, rental, or distribution under the constitution of 1879 and subsequent statutes, to exact a sum of money or other thing in addition to the legally established rates as a condition on which water so appropriated will be furnished to consumers. In that case it is said: "Property and ownership in these ditches . . . were as deeply founded and as thoroughly established in the law as property in any other thing capable of ownership . . . in 1878," and it was pointed out that the constitution did not change the situation except as to the cities.

In *Hildreth v. Montecito Water Company*¹⁰⁵ (1903) the Supreme Court of the State drew a distinction between the rights of consumers from a water company and members of a mutual company, showing that in the first instance they do not "possess rights to waters which are, in the ordinary sense, private property," whereas in the second case, "their respective water rights will remain private property, even though such persons form a corporation as their agent to distribute and keep the system in repair." The District Court of Appeals in 1906 dismissed the appeal in an action for the recovery of \$37.00 for water sold and delivered, though the contention was made by appellant that a real property right was involved.¹⁰⁶ These two cases are not directly in point, but are mentioned to show that they constitute the nearest approach to an exception to the consistency of holding in the State courts mentioned above.

Three cases¹⁰⁷ in 1908 approve the water right or easement,

¹⁰¹ Which provides: "Whenever any corporation organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is, and shall remain a perpetual easement to the land so sold . . ."

¹⁰² *Fudickar v. East Riverside Irrigation District* (1895) 109 Cal. 29, 41 Pac. 1024.

¹⁰³ *Supra*, p.

¹⁰⁴ *Supra*, n. 18.

¹⁰⁵ (1903) 139 Cal. 22, 72 Pac. 395.

¹⁰⁶ *Hesperia Land & Water Co. v. Gardner* (1906) 4 Cal. App. 357, 88 Pac. 286.

¹⁰⁷ *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 93 Pac. 490; *Graham v. Pasadena Land & Water Co.* (1908) 152 Cal. 596, 93 Pac. 498; *Orcutt v. Pasadena Land & Water Co.* (1908) 152 Cal. 599, 93 Pac. 497.

although they have reference to the supply of water in cities. *Stanislaus Water Company v. Bachman*¹⁰⁸ was a precise holding in the matter of "water rights" or "easements." Its approval of such rights was unqualified and it appears from the language of Mr. Justice Shaw, who rendered the opinion, that the rule was of general application, for he mentions the fact that the terms of the contract in litigation were prevalent throughout the San Joaquin Valley. In that case it is said: "The constitutional provision was not intended to prevent a land owner from acquiring and attaching to his land a right to the permanent use of water for its irrigation;" also "permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the constitution, subject only to the condition that the State may, if it chooses to do so, regulate and control the use."

Strong as this decision appears to have been, and compulsory as it seems to have been warranted by the earlier cases, it was overruled the next year in the case of *Leavitt v. Lassen Irrigation Company*,¹⁰⁹ where it is said: "If it be conceived that section 552 of the Civil Code is designed to confer upon any particular consumer any special permanent and preferential right above what is here stated, that effort, being plainly violative of the constitution, would be void." An attempt is made to distinguish *Stanislaus Water Company v. Bachman*¹¹⁰ and other cases. The net result, however, is that the rule laid down in the *Leavitt* case constitutes the present law in this State, and in general terms it is thus stated in that case: "Attempted reservation of a private right out of a public trust . . . would be futile and void."

The cases since *Leavitt v. Lassen Irrigation Company*¹¹¹ have not been entirely in harmony, and although the case has not been overruled, the Supreme Court of the State has shown a disposition substantially to approve water rights, although taking pains to distinguish the fact so as not to violate the principle.¹¹² The most striking example of this inclination is to be seen in the case of *Thayer v. California Development Company*.¹¹³ In that case an

¹⁰⁸ *Supra*, n. 21.

¹⁰⁹ *Supra*, n. 32.

¹¹⁰ *Supra*, n. 21.

¹¹¹ *Supra*, n. 32.

¹¹² *Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148, 131 Pac. 119.

¹¹³ (1912) 164 Cal. 117, 128 Pac. 21, 25.

owner of land in a district of the Imperial Valley for the irrigation of which the defendant company had appropriated water from the Colorado River, filed a petition seeking to compel the defendant to serve the land with water on tender of the established rate, but without paying the charge for a water right. The court refused to grant the petition on the grounds that defendant was not a public service company, for "where an irrigation company which appropriated water from a river to irrigate a named county, organized subsidiary corporations for the purchase of land in that territory, and transferred to them perpetual water rights for the irrigation of land owned by them, there was no dedication of the water right to public use; the essential feature of a public use being that it shall not be confined to privileged individuals, but open to the indefinite public while in this case not every land owner could use water." The case does not violate the rule of *Leavitt v. Lassen Irrigation Company*,¹¹⁴ but the reasoning argues that because the company has by its own contracts and regulations created privileges for favored individuals, therefore it cannot be a public service corporation, is not wholly convincing. In other words, the reasoning is not stronger than the implied premise, which is that the creation of the privileges was legally justifiable in the first instance, and the question may justly be asked, was not this very proposition the one which the case should have decided instead of assuming it as a fact?

Practically the same facts as in the last case were presented to the Federal Court in the same year (1912)¹¹⁵ when the water right charges of one of the other subsidiary corporations in the Imperial Valley was in litigation. The Federal Court decided the case in very definite terms in a manner which rendered the net result exactly opposite to that reached by the Supreme Court of the State, that is: "that a contract between complainant and such a local corporation by which the latter agreed that complainant should have all of its capital stock with the right to sell the same to settlers at such prices as it might fix and keep the proceeds, the effect of which was to enable complainant to charge settlers for water rights to their lands was void for want of con-

¹¹⁴ *Supra*, n. 32.

¹¹⁵ *Imperial Valley Water Co. v. Holabird* (1912) 197 Fed. 4, 116 C. C. A. 526.

sideration." In this case Judge Morrow, who rendered the opinion, said:¹¹⁶

"This leaves us to find the consideration for the so-called water right which the complainant claims to have acquired by the delivery through a Mexican Company of the water required to irrigate the lands to be settled upon by the stockholders of the defendant corporation. Is this a consideration that the law will recognize? We think not. In this case the land to be irrigated was not occupied, and the water right did not attach. When that time should arrive, the water right would attach to the land by operation of law, and not by virtue of the contract entered into between the complainant and the defendant. The complainant would have no water right to convey. There was, therefore, no consideration for the contract. We are fully advised as to the fact that voluntary contracts for the purchase of water rights from canal companies, whose works had been completed and were in operation, have been sustained by the courts in this State, but such cases must be carefully considered in the light of the facts of the particular case."

The attitude of the Supreme Court of California had not changed in the case of *Franscioni v. Soledad Land and Water Company* (1915)¹¹⁷ in which a water right was held to have been acquired under section 552 of the Civil Code.

It seems clear that the Legislature intended that easements of this sort should be created. In the act of 1897¹¹⁸ amendatory of the act of 1885,¹¹⁹ it is said: "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations . . . relating to . . . the sale or rental of easements and servitudes of the right to the flow and use of water . . ." Section 552 of the Civil Code provides: "Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold."

The question arises, what is the effect of these legislative utterances? Probably their operation is qualified, as suggested in the case of *Leavitt v. Lassen Irrigation Company*;¹²⁰ that is

¹¹⁶ *Supra*, n. 115, p. 15.

¹¹⁷ (1915) 170 Cal. 221, 149 Pac. 161.

¹¹⁸ Cal. Stats. 1907, p. 49.

¹¹⁹ *Supra*, n. 9.

¹²⁰ *Supra*, n. 32.

to say: they are only operative in so far as they do not conflict with the constitutional guarantee that the distribution of water shall remain a public use, and the courts will decide in the individual cases that arise, to what extent there is conflict as to those cases.

The question of the legality of charges for water rights or initiation fees has been discussed to some extent above in the consideration of the validity of the rights themselves. Looked at on principle it is difficult to escape the conclusion that such charges are illegal. The constitution provides for public service; public service means compulsory service and that without discrimination. The only possibility of weakness in the reasoning is that suggested by Mr. Wiel,¹²¹ namely, whether the recognition of private estate in the natural source of supply is necessarily prohibited by the law of public service. This raises an interesting and difficult question, for if one can regard public ownership as an extension of public service, as he suggests, there is good ground for doubting the illegality of initiation fees. As a purely abstract conception it is sound to think of an irrigated area in which water rights have been completely sold to the individual consumers, and they have been left the owners of the system. The difficulty is that in practice this ideal situation would seldom if ever be reached except on the basis of a mutual development scheme. With the company that starts as a public service company there are too many conflicting interests to make possible that co-operation which is the back-bone of mutual company enterprises. The public service company can never be relieved of any of its duties to its customers or to any of those who contemplate becoming customers; it must serve all who make demand. Therefore, since the constitution gives to consumers the right to service without payment of an initiation fee, the only inducement there could be for paying such a fee would be the interest in the distributing system. In so far as such an interest was proprietary, it would be burdened with the same duties of public service; in so far as it gave to its owner rights other than proprietary, to that same extent would it discriminate against those who had not seen fit to pay more than the constitution required. From whatever angle the problem is approached the final and convincing argument against the legality of initiation

¹²¹ *Supra*, n. 19, Vol. II, p. 1230.

fees is that the constitution on the one hand compels the company to serve and on the other does not authorize the exaction of anything more than a reasonable rental charge.

In further support of the invalidity of initiation fees may be noted various indications tending to show that public policy does not favor them. For example, in Colorado, where the theory is definitely accepted that the consumer is in the same situation as the original appropriator, the legislature has guarded against the natural result of the theory by prohibiting such charges.¹²² The same is true of Idaho.¹²³

In recent decisions on the point,¹²⁴ the Supreme Court of the United States upheld the Supreme Court of California in the principle that the company retains title to the system and cannot exact a charge for a water right, thus reversing the Circuit Court of Appeals, which had held contra. Decisions of the California Railroad Commission also held that initiation fees are illegal in this State.¹²⁵

There are arguments on the other side, not the least of which is the one based on public ownership, the advantages of which (in the sense in which the expression is here used) are apparent in the mutual companies. Recognizing the desirable feature of this mode of development by irrigation, and appreciating the success which it has actually experienced, it seems a narrow and arbitrary rule that declares that simply because a certain area was first irrigated by a water company, it is condemned always to be so irrigated and never to change to a more advantageous form. The argument might proceed a step further in the direction of socialism and say that the technical rights of the individual should be sacrificed to the good of the community without going further than we already go in our policy of eminent domain, for example. There is much force in the contention that the progress and welfare of a community should not be governed by its least progressive and least public spirited member.

Another attack which is made upon the public service doctrine

¹²² *Supra*, n. 90.

¹²³ Idaho, Laws, *supra*, n. 91.

¹²⁴ *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County* (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 Sup. Ct. Rep. 652. It is to be added, however, that Mr. Blanchard's paper was written in April, 1916.

¹²⁵ *Application of Murray and Fletcher* (1915) 7 Cal. R. R. Com'n Dec. 334; *Sac. V. R. Co. v. Sac. V. W. Side C. Co.* (1915) 7 Cal. R. R. Com'n Dec. 113.

is based upon the frequency of unfortunate cases. The over sanguine development company which promised more than it could perform in order to induce development, and later, through public rate fixing and antagonism born of unsatisfactory service, has been forced out of business to the detriment of all concerned, is an exhibit under this line of argument. Another bit of evidence which is frequently presented in support of water right charges is the undeniable fact that they have been almost universally charged and collected as a matter of practice, without disastrous results. This argument is, of course, dependent for its force upon supplementary showings, such, for example, as that the initiation fees have been used for other purposes than simply to swell dividends on the capital stock.

Taking all of these arguments into consideration and with due regard for the dignity of decided cases, the better opinion would declare initiation fees unjustifiable as well as illegal. The most rapid progress in development is seldom the best. The personal rights of the American people as guaranteed by their constitutions are not to be infringed for any ordinary reasons. The time may come in the future when public ownership will be well enough established as a principle of political economy to justify a modification, or, as Mr. Wiel suggests, an extension of our theory of public service. At the present the reasons are not sufficient for changing the law of public service which has dominated the question in California, and laid it down as a legal rule that charges for initiation or water right fees are illegal.

V.

From the above analysis of rights which may and those which may not arise out of contract, it may be said in general that in California water contracts may give rights in every instance where they do not conflict with the laws of public service as announced by the courts and the legislature. Public service rights exist irrespective of contract,¹²⁶ for they vest in the individual consumer by reason of his status as a member of the class, for whose benefit the water has been appropriated.¹²⁷ Contract rights and public service rights are concurrent and enforced by

¹²⁶ *Spring Valley Water Co. v. San Francisco* (1881) 61 Cal. 3.

¹²⁷ *Hildreth v. Montecito Water Co.*, *supra*, n. 105; *Mahoney v. American L. & W. Co.* (1905) 2 Cal. App. 185, 83 Pac. 267; *Leavitt v. Lassen Irrigation Co.*, *supra*, n. 32.

different forms of remedy: specific performance¹²⁸ and action for breach of contract¹²⁹ are the remedies for the first class of rights, mandamus¹³⁰ and tort action for the second. Although the purpose of this paper is primarily a discussion of contract rights, there are several phases of public service prohibition against discrimination which should be mentioned, inasmuch as they so frequently limit the rights which contracts seek to establish.

Among the public service requirements should be mentioned that of equality of rates, regardless of cost, of any individual service. It is obvious that an irrigator taking water from the canal at a great distance from the source can not be supplied at the same cost to the company as a consumer located close to the source. If the rates are to be equal, the consumers near the source must contribute to pay a part of the cost of serving the less fortunately located land. Is it right that they should be compelled to make this contribution, for which they receive no value in return? On the other hand, if the rates are to be made on the basis of the actual cost of service, the distant irrigator could not afford to pay the exorbitant rates. The laws of public service are very definite in deciding this question on the grounds of public policy. In *Niday v. Barker*¹³¹ it is said: "We do not apprehend that rental charges for the use of water from irrigating canals are based upon the actual expense of carriage and delivery to each individual consumer. . . . This is not the theory on which water rates are established." On the other hand, *Boise City Irrigation Company v. Turner*¹³² sanctions unequal rates in so far as they are created by contracts made before the constitution took effect. There is a *dictum* in the case, however, to the effect that as to contracts made after the constitution no variation in rates would be lawful. In California

¹²⁸ *Clyne v. Benicia Water Co.* (1893) 100 Cal. 310, 34 Pac. 714.

¹²⁹ *Crow v. San Joaquin Water Co.*, *supra*, n. 20.

¹³⁰ *San Diego Water Co. v. San Diego* (1897) 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460; *San Diego Land & Town Co. v. Jasper*, *supra*, n. 29; *Osborne v. San Diego Land & Town Co.* (1900) 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; but in *City of South Pasadena v. Pasadena Land & Water Co.*, *supra*, n. 107; *Graham v. Pasadena Land & Water Co.*, *supra*, n. 107 and *Orcutt v. Pasadena Land & Water Co.*, *supra*, n. 107, there appears to be authority for granting mandamus to enforce a contract right.

¹³¹ (1909) 16 Idaho 73, 101 Pac. 254; *Lanning v. Osborne*, *supra*, n. 23, is in accord.

¹³² *Supra*, n. 65.

the law requires that the rates be equal,¹³³ except as between different classes of users;¹³⁴ that is, the rate fixed for water to be used for mining purposes may be different from the irrigation rate, but each individual using water for irrigation is entitled to the same rate as every other irrigator. A case tried in the Supreme Court of Alabama¹³⁵ has gone to the extent of sanctioning a slight discrimination in rate where it appeared that the rate charged to the other consumers was reasonable; but this case does not state the law, at least in the Western States, and the theory of such a holding is distinctly at variance with the fundamental principles of public service. A good answer is to be found in the language used in an Idaho case:¹³⁶ "Nothing can be clearer than that the supplying of any portion of the land under the system at anything less than the regularly established rate adds to the burden of the other land which is thereby called upon to make good just compensation for the use of the property."

In a Maryland case¹³⁷ it is said that a public service corporation such as a water supply company cannot be required to extend its plant into additional territory, when the revenue from such service will not pay the cost of extension and maintenance of the service, and the corporation has not funds to pay therefor, and cannot sell bonds for that purpose, so that an order of the public service commission requiring it to make such extension is unreasonable. But the Supreme Court of California has recently held¹³⁸ that mandamus will lie to compel a water company to extend its service where there is a reasonable necessity therefor, and that the cost to the company of such extension is not a controlling feature in determining the reasonableness of a demand, which is a question of fact to be decided by the court in each particular

¹³³ *Mandell v. San Diego Land & Town Co.*, *supra*, n. 23; *Fellows v. City of Los Angeles* (1907) 151 Cal. 52, 90 Pac. 137 and Act of 1885, *supra*, n. 9.

¹³⁴ *Lanning v. Osborne*, *supra*, n. 23, but the Act of 1880, Cal. Stats. 1880, p. 16, forbids control over the use of water after delivery.

¹³⁵ *State ex rel Ferguson v. Birmingham W. W. Co.* (1910) 164 Ala. 586, 51 So. 354.

¹³⁶ *Boise City Irrigation & Land Co. v. Clark*, *supra* n. 65.

¹³⁷ *Public Service Com'n of Md. v. Brooklyn & C. B. Light & Water Co.* (1914) 122 Md. 612, 90 Atl. 89.

¹³⁸ *Lukrawka v. Spring Valley Water Co.* (1915) 169 Cal. 318, 146 Pac. 640.

case. This decision supports the attitude of the Railroad Commission of the State.¹³⁹

Another proposition, well established by the principles of the law of public service, is that there can be no priorities in service among consumers, and such is the law in California.¹⁴⁰ In other Western States, as will be pointed out later, the doctrine, however, has been modified. The question most frequently arises in the event of a shortage in the water supply, when its decision becomes of primary importance; for if priorities of service are permitted, then consumers are entitled to service in the order of their priority, each receiving his full quota of water before the next lower in the scale receives any water at all; whereas, if priorities are not recognized, all must prorate in time of drought. It is conceivable that prorating may, in some instances, operate to prevent any consumers from receiving enough water to be of any practical value for irrigation. This was actually the case during the years 1900 to 1905 in the district supplied by the San Diego Land and Town Company. During that period of protracted drought many citrus orchards died out and almost the only ones that survived were those irrigated by means of private pumping plants. Such a situation is impressive, yet it must be remembered that it is the extreme and unusual case, and further that absolute equality of service has many economic as well as legal advantages. Its simplicity facilitates practical administration and minimizes costly litigation, and the assurance it offers to new irrigators tends to stimulate development in a dry country. The dangers it affords for speculative and over-optimistic development should be considered in connection with the discouraging prospect to the new irrigator which the priority system offers.

On the one hand, Idaho is an example of the successful operation of the principle of priorities, while on the other, California demonstrates the practicability of prorating, so it may be that in seeking to determine the superiority of one system over the other the question is more academic than real.

¹³⁹ *Warren v. Murphy Water, Ice and Light Co.* (1914) 4 Cal. R. R. Com'n Dec. 1238; but see *Ferrasci v. Empire Water Co.* (1915) 6 Cal. R. R. Com'n Dec. 309, "as previously decided by the commission, no utility should be compelled to extend its service unless such extension could be accomplished so as not to work injury to consumers at present receiving satisfactory service."

¹⁴⁰ *Byington v. Sacramento Valley West Side Canal Co.* (1915) 170 Cal. 124, 148 Pac. 791.

Turning to the California cases, the decisions seem to be uniform. The broadest statement of the principle is, perhaps, that contained in *Leavitt v. Lassen Irrigation Company*:¹⁴¹ "The fundamental and all important proposition, then, is this, that a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water." Other cases which announce the same rule, though in less comprehensive language, are *Lassen Irrigation Company v. Long*,¹⁴² *Rickey v. East Redlands Company*,¹⁴³ *Lowe v. Yolo, etc., Company*¹⁴⁴ and the two decisions in *Souther v. San Diego Flume Company*,¹⁴⁵ where it is stated that prorating is generally recognized.

The only limitation on the doctrine of prorating is the normal capacity of the system; that is, all who apply and tender the rate must be served up to the time when the system is supplying all those for whom it has facilities. Among these consumers all shortages must be prorated, but those receiving water in times of excessive supply establish their rights only as to the excess, and cannot claim any water to the detriment of the regular consumers. The company must not undertake to supply water beyond its capacity, and an injunction may be granted to prevent it.¹⁴⁶ This, of course, prevents the company from reducing the service of present consumers in order to take on new customers,¹⁴⁷ and, as said in *San Diego Land and Town Company v. Sharp*,¹⁴⁸ (by the lower court the decision of which was affirmed): "A consumer whose land is situated within the flow of such a distributing system as that of this company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though a larger area, by reason of more

¹⁴¹ *Supra*, n. 32.

¹⁴² (1909) 157 Cal. 94, 106 Pac. 409.

¹⁴³ (1903) 141 Cal. 221, 74 Pac. 754.

¹⁴⁴ (1908) 8 Cal. App. 167, 96 Pac. 379; (1910) 157 Cal. 503, 108 Pac. 297.

¹⁴⁵ *Supra*, n. 97, 98.

¹⁴⁶ *McDermont v. Anaheim, etc., Co.* (1899) 124 Cal. 112, 56 Pac. 779; *Lanning v. Osborne, supra*, n. 23; *Souther v. San Diego Flume Co.* (1901) 112 Fed. 228.

¹⁴⁷ *Hildreth v. Montecito Water Co., supra*, n. 105.

¹⁴⁸ *Supra*, n. 23.

favorable conditions, may thus be brought under cultivation. Such a rule would manifestly work destruction to the just and well-established rule that in cases like this, the first in time is the first in right."

In Colorado the previously mentioned theory of regarding the consumer from the company as an appropriator, would logically operate to give him the same priority in supply which he would obtain by appropriation, and there is authority for the statement that such has actually been the result.¹⁴⁹ In spite of the fact that prorating stipulations in contracts are held to be valid as waivers of priorities,¹⁵⁰ yet the statute of 1879,¹⁵¹ providing for prorating in times of shortage, has not received the sanction of the courts, but seems rather to be regarded as unconstitutional.¹⁵²

The attitude of Idaho and Arizona is similar to that of Colorado and opposed to California. Although Idaho recognizes that the consumer may voluntarily waive his priority by contract with the company,¹⁵³ yet, in the absence of such waiver, prior rights to service will be enforced.¹⁵⁴ In *Guber v. Nampa and Meridian Irrigation District*,¹⁵⁵ the court said, on rehearing, referring to its former decision, which it approved on this point: "As we read this decision, it construes sections 4 and 5 of Article 15 of the constitution as creating a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream. . . . 'The rights of the prior appropriator must at all times be recognized and in an action to compel the owners of a canal to furnish water to such subsequent applicant, the canal company can only be compelled to furnish the water so dedicated by such applicant—that is the water applied to a beneficial use by him when not made by the prior appropriator

¹⁴⁹ *Farmers, etc., Co. v. Southworth* (1889) 13 Colo. 111, 21 Pac. 1028; *Farmers, etc., Co. v. White* (1903) 32 Colo. 114, 75 Pac. 415; *City and County of Denver v. Brown*, *supra*, n. 40.

¹⁵⁰ *O'Neil v. Fort Lyon Canal Co.* (1907) 39 Colo. 487, 90 Pac. 849.

¹⁵¹ Colo. Laws, 1879, p. 97, § 4.

¹⁵² Cases cited in n. 149, *supra*; also *Nichols v. McIntosh* (1893) 19 Colo. 22, 34 Pac. 278.

¹⁵³ *Jackson v. Indian, etc., Co.* (1909) 16 Idaho 430, 101 Pac. 814 and (1910) 18 Idaho 513, 110 Pac. 251; *Creer v. Bancroft, etc., Co.* (1907) 13 Idaho 407, 90 Pac. 228.

¹⁵⁴ *Farmers' Co. v. Riverside Irrigation District* (1908) 14 Idaho 450, 94 Pac. 761; *Brose v. Board of Directors of Nampa and Meridian Irrigation District*, *supra*, n. 44.

¹⁵⁵ (1911) 19 Idaho 765, 116 Pac. 104.

thereof.'” Arizona fully recognizes priorities among consumers;¹⁵⁶ also Nebraska in a more limited sense.¹⁵⁷

VI.

An attempt has been made above to indicate what the law is on the subjects discussed. In such an investigation the tendency is too often to lose sight of the fact that the cases which make the law are in almost every instance brought into the court to try the actual rights of persons and not for the purpose of vindicating abstract legal views nor of furnishing the courts with material for academic discussion. Where the logical application of rules of law works manifest injustice, it is plain that there is something the matter with the rule. On the other hand, the law on any subject must be broad enough to cover variant cases and is not to be changed simply because a hard case occasionally arises. Looked at from this point of view, and recognizing that law and justice are substantially synonymous terms, it will be seen that the law can never be static, but must admit of sufficient modification to meet changing conditions of the practical world. In apparent conflict with this view is the forceful argument that security and uniformity are of greater importance in the law than minute justice, since if one knows what the law is today and that it will be the same tomorrow, he may govern his acts in safe reliance upon that law, even though in so doing he may sacrifice some rights to which, by natural justice, he would seem entitled. The theory is that such minor sacrifices are preferable to a system by which every person acts at the peril of his own judgment as to his rights. Rigid adherence to such a view commits one to the proposition that only the legislature can change the law. Theoretically such a conception may be sound, but as a practical solution of the difficulty it is far from satisfactory; so many considerations enter into almost every case that the simple application of statutory rules would not be enough. There are three ingredients which must be blended in the proper proportions to make the net result serve the purpose for which law was created. The first of these is the body of the law as it

¹⁵⁶ *Hargrave v. Hall* (1891) 3 Ariz. 252, 73 Pac. 400; *Slosser v. Salt River, Etc., Co.* (1901) 7 Ariz. 376, 65 Pac. 332; *Gould v. Maricopa, Etc., Co.* (1904) 8 Ariz. 429, 76 Pac. 598; *Salt River, Etc., Co. v. Nelssen* (1906) 10 Ariz. 9, 85 Pac. 117.

¹⁵⁷ *Fenton v. Tri-State Land Co.*, *supra*, n. 45.

exists; the second is the legislature and the third is sound judicial wisdom. The three are compensatory and mutually restrictive.

Testing the results which have been obtained in California on the broader ground of justice and public satisfaction, it is worthy of notice that the courts have in general taken an enlightened view of their function in administering the fundamental principles of public service, to which the constitution has committed water companies, but with due regard for the special circumstances which have from time to time demanded adjustments and modifications as to details. The federal courts have, perhaps, been less inclined to feel their way in making such adjustments than the Supreme Court of the State, and they have, apparently, considered more carefully the practical application of their decisions. Speaking generally, legislatures have shown a commendable willingness to furnish the compensating feature, which is their function, but their endeavors sometimes remind one of that passage in Browning's *Rabbi Ben Ezra*: "What I aspired to be and was not, comforts me."

In the earliest history of California as a State, public opinion, not unnaturally, considered rapidity of development as the most important end, and any means which served that end were favored. At that time, it may be noticed, practically complete freedom of contract was permitted, the only restriction worthy of mention being one against excessive rates, usually in the form of a provision for public rate fixing. The adoption of the constitution of 1879 marked not only the crystallization of a growing tendency toward restriction upon public distribution of water, but it initiated an era of rigid regulation of water companies, putting upon them all of the burdens of public service without attempting to give them the benefit of special circumstances and conditions which distinguished them in certain instances from absolute public service companies. The severity of this public sentiment was reflected in the holdings of the federal courts and even the Supreme Court of the State to the effect that no contract made by a water company could be binding. But before the legislature attempted to correct this arbitrary application of a legal rule, the courts themselves recognized that it was impracticable and sought to draw reasonable distinctions where circumstances justified departure.

Following the period of strictness there was a period of re-

action expressed in the statutes of 1897, 1901 and others. At this time the courts were again called upon to make reasonable the application of legislative ardor which had then swung from its previous position of severity to the water companies to one of extreme leniency. The laws of public service which it had previously been necessary to distinguish, were later invoked to show the general principles to which the State had, by its constitution, been committed.

Much time could be spent in pointing out in detail the operation of the compensatory development of the law, and perhaps, just as much time in citing instances where the theory seems not to have applied. To the writer it seems that in spite of the few exceptions which cannot be denied, the feature of the steady development of the law in accordance with practical demands, is, if not the most impressive, at least the most interesting feature of an examination of the statutes and the cases.

The only question which remains for consideration in this paper is to determine what in general are the characteristics of the present era. There are certain indicia which cannot be overlooked. They represent a conflict of theories as to water distribution. On the one hand the railroad commission has proceeded in the matter of public regulation to questions so minute and detailed,¹⁵⁸ that it may well be asked if the distributing company has been left with any discretion at all in the conduct of its own business. On the other hand, the extent and activity of irrigation development by means of mutual projects of one kind or another show an increasing desire to get away from the rigidity of public regulation. At the present time, it seems doubtful if either theory is likely to prevail to the exclusion of the other. Both

¹⁵⁸ Among the many instances of minute control, the following are typical examples: In *City of Corona v. Corona City Water Co.* (1915) 6 Cal. R. R. Com'n Dec. 16, defendant was directed to submit for approval its rules and regulations governing the distribution of water. Rates were revised by the Commission in *Application of Anna Del Segno*, (1915) 6 Cal. R. R. Com'n Dec. 44, and *Application of Atwood* (1914) 4 Cal. R. R. Com'n Dec. 570. Rules and regulations as well as rates were passed on in *Application of Eastside Canal and Irrigation Co.* (1914) 4 Cal. R. R. Com'n Dec. 597 (where it was also directed by the commission that "within twenty days, defendant shall take over and operate all laterals supplied from its ditches"); *East Bakersfield Improvement Association v. Bakersfield Water Company* (1915) 6 Cal. R. R. Com'n Dec. 462; *Application of Wadley* (1915) 6 Cal. R. R. Com'n Dec. 730; *Sacramento Valley Realty Co. v. Sacramento Valley West Side Canal Co.* (1915) 7 Cal. R. R. Com'n Dec. 113. An increase in the size of mains was ordered in *Gittings v. Windsor Water Co.* (1915) 6 Cal. R. R. Com'n Dec. 498, etc.

provide protection to the irrigator, one by giving him the services of experts to set out the terms under which he will be served with water and the other by making him the master of his own project. It can hardly be doubted that he is in a better situation today than he has ever before been, although, perhaps, in regarding his welfare, the development of the water resources for irrigation has to some extent been retarded.

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